IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4468 OF 2005

Jayvant Chandearrao Mohite ..Petitioner.

Versus

Bhaskar Vishnu Kulkarni ..Respondent.

Mr. Anilkumar Patil for the Petitioner.

Mr. N.V. Bandiwadekar for Respondent.

CORAM : S. A. BOBDE, J.

DATED : 12TH JULY, 2005.

P.C.:

1. Rule, returnable forthwith.

2. Mr. Bandiwadekar waives service of rule for Respondent.

3. Heard by consent.

4. The main issue in this petition is about validity of the order below Exh. 28. Since Exh. 26 has been dismissed on the basis of which Exh. 28 has

also been dismissed.

5. The respondent filed the suit for redemption of mortgage of the suit land against the appellant. According to the respondent, it was mortgaged by the conditional sale; while according to the petitioner it was a sale outright with a condition of repurchase. The trial court upheld the respondent’s claim and decreed the suit.

6. In appeal filed by the petitioner, the petitioner applied for amendment of his written statement. By amendment the petitioner pleaded that the suit transaction is void in view of the provisions under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, hereinafter for short referred as "Consolidation Act". This amendment was allowed. The petitioner, therefore, applied for framing of the issue and for referring the matter to the appropriate authority under section 7 of the Consolidation Act vide Exh. 28. This application has been rejected.

7. Having regard to the provisions of the said Consolidation Act and in particular section 36 thereof, it is clear that the issue whether a

particular piece of land amounts to a fragment or not, is the matter within the purview of the Authorities under the Consolidation Act. Section 8 bars a transfer so as to create a fragment. Such transfer is made punishable under section 9 and the Collector is empowered to summarily evict a person, unauthorizedly occupying or wrongfully in possession of any land, the transfer of which is void under the provisions of the Consolidation Act. Section 36A and 36B bar the jurisdiction of the Civil Court to decide matters which are required to be settled, decided or dealt with by the State Government or any officer or authority under the Act. In fact section 36B, requires the matter to be referred to the competent authority under the Consolidation Act.

8. In this view of the matter, I am of the view that Exh. 28 ought to be allowed. The impugned order below Exh. 28 dated 14.02.2005 is hereby set aside. As a consequence, the impugned order below Exh. 26, dated 14.02.2005 by which the learned Additional District Judge has refused to frame issue in view of the rejection of Exh. 28, is also hereby set aside. Exh. 26 is also allowed.

9. Rule is made absolute in the above terms.

12.07.2005 (S.A.BOBDE,J.)